FILE COPY

NOV 5 1935

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 232.

BRONX BRASS FOUNDRY, INC.,
Appellant,

vs.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. PALMENBERG'S SONS, INC.,
Respondent.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE VISCOSE COMPANY AS *AMICUS CURIAE.*

JOHN A. McMANUS,
Counsel for the Viscose Company as Amicus Curiae.

SPENCER, ORDWAY & WIERUM,
Solicitors.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

INDEX

PAGE

OPENING STATEMENT. 1

REASON FOR INTEREST OF AMICUS CURIAE. 2

ARGUMENT:

A. In determining whether a preference results from a payment or transfer, the statute expressly provides that the time of the payment or transfer shall govern. 3

B. The necessary effect of the holding below is to make every payment on account within four months of bankruptcy a preference if the debtor were insolvent. This is contrary to the expressed purpose of Congress. 7

C. The result of the ruling below is virtually to render void the "reasonable cause to believe" requirement of the statute, which is generally held of real importance in cases of partial payment. 8

CONCLUSION. 10

TABLE OF CASES CITED

	PAGE
Brittain Dry Goods Co. v. Bertenshaw, 66 Kan. 734...	4
Commerce-Guardian Trust & Savings Bank v. Devlin, 6 Fed. (2) 518, 519.....	7
Eyges v. Boylston National Bank, 294 Fed. 286.....	4
Haas v. Sachs, 68 Fed. (2) 623.....4, 5, 7	
Hershon v. Abelson, 69 Fed. (2) 102.....	9
Irving Trust Co. v. Townsend, 65 Fed. (2) 406, 409...	9
Mansfield Lumber Co. v. Sternberg, 38 Fed. (2) 614..	4
Remington on Bankruptcy, Section 1812.....	4
Rubenstein v. Lottow, 223 Mass. 227.....	4
Slayton v. Drown, 93 Vt. 290.....4, 5, 6	
W. S. Peck & Co. v. Whitmer, 231 Fed. 893.....	4, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

BRONX BRASS FOUNDRY, INC., Appellant, vs. IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. Palmenberg's Sons, Inc., Respondent.	No. 232.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE VISCOSE COMPANY AS *AMICUS CURIAE.*

Opening Statement.

This brief is submitted with relation only to that part of the decision of the Circuit Court of Appeals which holds that the creditor received a voidable preference (76 Fed. [2] 935, 937).

We shall not argue any question of fact, but shall assume with the learned court below that at the time the appellant was paid $1,000 on account of its claim of $3,000 within four months of the date of the filing of the petition in bankruptcy, the appellant knew that J. R. Palmenberg's Sons, Inc., was insolvent; also that if the assets existing at the time of such payment had been applied to the payment of all the creditors,

the appellant would not have received more than its pro rata share. The question of law to be argued, then, becomes this: Can a creditor who, within four months of bankruptcy, receives from his debtor, who is known to be insolvent, a payment on account of his claim, which payment is not shown to have been a greater percentage of the claim than all other creditors could then have got upon their claims, be forced to surrender that payment as a condition of the allowance of the balance of his claim in the bankruptcy proceeding?

The decision below answered this question in the affirmative upon two grounds: (1) that the payment necessarily resulted in giving the creditor "an advantage over the other creditors" who did not receive a like payment at the same time upon their claims, and (2) that the relevant time to test the question of "an unlawful preference" is not the time of the payment, but some later time not specified, when "the ultimate result" of the payment in relation to the payments received by other creditors in the bankruptcy proceeding is known.

Reason for Interest of the *Amicus Curiae*.

The interest of the Viscose Company in the present case grows out of the fact that by decree of the United States District Court for the Southern District of New York it has been ordered to pay over to a Trustee in Bankruptcy the sum of $13,010.63 as the result of a plenary suit instituted by the Trustee under Section 60(b) of the Bankruptcy Act to set aside an alleged preferential transfer to it from the bankrupt. This decree was entered, although the court found that at the time of the transfer the debtor though insolvent had assets sufficient if then distributed to have paid all its creditors a like or greater percentage of their claims.

In the case at bar the decision expunging the appellant's claim was made under Section 57(g), but inasmuch as the claims which that section affects include, among others, those of creditors who have received preferences voidable under Section 60(b), it would be natural to assume that the de-

cision under Section 57(g) might be applied to the case of a plenary suit by the Trustee to recover an alleged voidable preference under Section 60(b).

The Viscose Company case is now pending on appeal in the United States Circuit Court of Appeals for the Second Circuit, is No. 32 on the October Term, 1935, calendar of that court and is entitled *Harry J. Jentzer, Trustee,* v. *The Viscose Company.* The case appeared on the calendar of that court for argument on October 21st, but the argument was adjourned until December 16th to await the decision of this court in the above-entitled case.

ARGUMENT.

A.

In determining whether a preference results from a payment or transfer the statute expressly provides that the time of the payment or transfer shall govern.

Section 60(b) of the Bankruptcy Act is the controlling statute. Its provisions govern the disallowance of a claim under Section 57(g) and authorize the recovery of a preference where two circumstances concur: (1) where at the time of the transfer the debtor was insolvent and the judgment or transfer "then operate as a preference," and (2) where the creditor "then" had reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference.

Section 60(b), so far as is here material, provides:

> "If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer * * * being within four months before the filing of the petition in bankruptcy the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it * * * shall then have reasonable cause to believe that the * * * transfer would effect a preference, it shall be voidable by the Trustee and he may recover the property or its value from such person."

The phrase in this section "at the time of the transfer" leaves no room for question that the section standing alone refers only to the time of the transaction which is assailed. The court below, in fixing the relevant time to be some time after bankruptcy has intervened, must, we think, have reached this conclusion by placing undue emphasis upon the words of futurity in the clause in Section 60(a) reading "and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Reference is there being made to the enforcement (something which is to take place in the future) of a judgment or transfer. Hence the use of the future tense. To permit that phrase in Section 60(a) to override the clear language of Section 60(b) seems to us to disregard the explicit provisions of Section 60(b) which make it as clear as words can possibly do that the payments to be disturbed are those which constitute a preference at the time they are made.

With the exception of two cases in Massachusetts (*Rubenstein* v. *Lottow*, 223 Mass. 227, and *Eyges* v. *Boylston Nat. Bank*, 294 Fed. 286), we believe it will be found that by the great weight of judicial authority Section 60(b) has been construed to mean exactly what it says, namely, that the preferential effect of a transfer must be judged according to its operation at the time the transfer was made and not according to later results. Hence it has been usually held that, if a transfer leaves the debtor with enough to pay a like or greater percentage to other creditors of the same class, no preference results. *W. S. Peck & Co.* v. *Whitmer*, 231 Fed. 893; *Mansfield Lumber Co.* v. *Sternberg*, 38 Fed. (2) 614; *Haas* v. *Sachs*, 68 Fed. (2) 623; *Slayton* v. *Drown*, 93 Vt. 290; *Brittain Dry Goods Co.* v. *Bertenshaw*, 66 Kan. 734; Remington on Bankruptcy, Section 1812.

In *Peck & Co.* v. *Whitmer*, (C. C. A., 8th Cir.) 231 Fed. 893, 897, the court said:

> "We are of the opinion, however, that by the very language of Section 60(b) the payment must operate

> as a preference at the time it is made, or not at all, and the belief of the creditor as to whether it will constitute a preference or not must be of the time the payment is made."

In *Haas* v. *Sachs*, 68 Fed. (2) 623, at 625, the same court said:

> "This court has held that whether the effect of the transfer will be to enable the creditor receiving it to obtain a greater percentage of his claim than other creditors of the same class, is to be determined as of the date of the actual transfer, and not as of some date when later events have altered the assets or liabilities or when court liquidation may have caused shrinkage of values and other losses."

The quotations just given state the conclusion arrived at. The following quotation from *Slayton* v. *Drown* (*supra*) gives convincing reasons for this conclusion:

> "The fault in the plaintiff's contention that the payment received by the alleged preferred creditor is to be measured by what the other creditors received on the final settlement of the bankrupt estate is apparent when considered in connection with a few familiar illustrations. Suppose that, after the alleged payment, the debtor in the meantime mismanages the business, or successfully conceals a portion or the whole of his property, or a fire destroys his assets, or a world war ruins his business, and that, in the final settlement, the expense of the management and settlement of the estate, involving an expensive litigation, leaves nothing, or only a small part to be distributed among the other creditors, in such circumstances, could it be said that a creditor having received a payment on his debt of no greater percentage than the bankrupt was 'then' able to pay all his other creditors of the same class was a preference, and such fact reasonable ground to believe that such payment would effect a preference even though it should ultimately turn out on the closing up and final settlement of the bankrupt estate that nothing or only a small per cent., much less than the per cent. paid the alleged preferred creditor, was left to pay the other creditors? Can it be reasonably inferred that it was

the intention of Congress in the passage of the Bankruptcy Act to make a payment of the bankrupt to one of his creditors, of a sum not exceeding a per cent. which he was able to pay from his assets subject to the payment of his debts, to each of his other creditors, a preference voidable by the trustee? Must the preferred creditor be charged with a belief that no one would have entertained at the time the payment was made? We think the act was not passed with any such result intended. It cannot be conceived that the act contemplated that the creditor receiving a payment from an insolvent debtor should be charged with reasonable cause to believe that the payment would effect a preference, when, if the exact facts had been known to him at the time the payment was made, they would not have disclosed that the payment was a preference. To establish that the defendant had reasonable cause to believe that the payment would effect a preference, the burden was upon the trustee to show that such was the effect of the payment at the time it was made; for otherwise there would be no basis for the belief.

"In the case at bar the plaintiff's own evidence disclosed that the payment to the defendant was of no greater per cent. of his debt than the insolvent was 'then' able to pay to his other creditors. Indeed, he could have paid to them a much larger per cent. of their debts at that time than he paid to the defendant, while up to the present time no one knows what the bankrupt's estate will be able to pay the creditors on final settlement.

"The portion of the charge excepted to made the recovery to depend, not upon the defendant's having received a greater percentage of the bankrupt's estate than other creditors of the same class would have received if the assets had then been distributed *pro rata* but upon his having received more than other creditors of the same class might ultimately receive on the final settlement of the estate. As we have seen, this was error, and harmful error, and the exception to the charge must be sustained."

B.

The necessary effect of the holding below is to make every payment on account within four months of bankruptcy a preference if the debtor were insolvent. This is contrary to the expressed purpose of Congress.

The court below not only declined to follow these cases declaring that the relevant time was the time of the alleged preferential payment, but, following *Commerce-Guardian Trust & Savings Bank* v. *Devlin,* 6 Fed. (2) 518, 519, held that since the payment on account necessarily resulted in giving the appellant "an advantage over the other creditors," the payment was preferential. It was said to be of no consequence that, at the time the payment on account was made, it did not represent a larger percentage of the appellant's claim than the other creditors would have received had the assets of the bankrupt been then liquidated or distributed. The rule of "advantage over other creditors" is thus substituted for the rule laid down in the statute of "greater percentage."

Before the decision in the case at bar, the Circuit Court of Appeals for the Eighth Circuit (in *Haas* v. *Sachs,* 68 Fed. [2] 623, cited above) had rejected *in toto* the notion that a payment on account was necessarily preferential because it gave an advantage to the receiving creditor. Reference to the opinion at the top of page 625, second column, shows that the Trustee had urged upon the court that no matter what the state of the assets at the time of the transfer was, the payment on account constituted a preference "because the allowance of the balance of the appellant's claim would result in giving him an advantage over other creditors." The court said:

> "If this contention of appellant is sustained, then every payment within four months would be a preference if the bankrupt were insolvent. We think the question is not an open one in this jurisdiction. If

> enough assets remain after a transfer to one creditor to give other creditors as great or greater percentage of their claims, then no voidable preference results."

We think it is not possible to find anywhere in the Act any language indicating that the Congress intended to make every payment on account within four months preferential if the debtor were insolvent. The rule adopted below would go even further and make every such payment voidably preferential because the required element of reasonable cause to believe under such ruling becomes a mere matter of inescapable inference, as we shall show presently.

If Congress had intended such a result it would have provided in plain language that all payments on account by an insolvent debtor within four months of bankruptcy must be surrendered. Such a rule would at least be workable and very simple; but Congress did not say that, and there is no justification for judicial legislation on this point.

Instead of so providing, Congress enacted Section 60(b) and thereby specified precisely the circumstances under which payments by an insolvent debtor to a creditor should be disturbed. We submit that it should be held as a matter of construction that the language of Section 60(b) is to be given its ordinary and usual meaning, namely, that such payments must be surrendered, or may be recovered, only in case the payment operate as a preference at the time it is made and only where the proof shows that the receiving creditor "then" had reasonable cause to believe that the payment would effect a preference. The test of preference laid down in the Act is "greater percentage" and not "advantage."

C.

The result of the ruling below is virtually to render void the reasonable cause to believe requirement of the statute which is generally held of real importance in cases of partial payment.

The doctrine that every payment on account by an insolvent debtor within four months of bankruptcy constitutes

a preference will virtually nullify Section 60(b), which makes reasonable cause to believe that the transfer would effect a preference a prerequisite. This is true because a creditor who receives a payment which other creditors do not receive must surely know that he is getting an "advantage" from which a preference will necessarily result in the event of bankruptcy because he will still have the balance of his claim for filing in the bankruptcy proceeding. Hence he will be charged as a matter of law with reason to believe.

Yet the decisions say that where the payment is only a percentage of the total debt, it is a condition of recovery that the creditor shall have had reasonable cause to believe that he was obtaining a preference, and this cannot be inferred from a mere showing of knowledge of insolvency. The distinction in this connection between a partial payment and a payment in full is clearly expressed in the case of *W. S. Peck & Co.* v. *Whitmer,* (C. C. A.) 231 Fed. 893, at page 896, as follows:

> "Where in any particular case it is shown that a creditor at the time he receives full payment of his debt knows that his debtor is insolvent or has knowledge of such facts, which if investigated would show insolvency, it necessarily results that the creditor had reasonable cause to believe that the enforcement of the transfer would effect a preference. But in a case where the transfer or payment amounts to but a small percentage of the total debt, knowledge of the insolvency of the debtor or facts which if investigated would lead to such knowledge is not conclusive upon the question as to whether the creditor had reasonable cause to believe that the enforcement of the transfer or payment would effect a preference."

This principle was recognized by the court below in *Irving Trust Co.* v. *Townsend,* 65 Fed. (2) 406, 409. (See also *Hershon* v. *Abelson,* 69 Fed. [2] 102, where the court below cited and relied upon the *Peck* case.)

These decisions must fall with the section if the ruling below is to stand. Their principle cannot co-exist with the idea that the creditor receiving a payment on account is to be charged as a matter of law with reason to believe.

In the case at bar no reference to this requirement is found in the opinion of the Circuit Court of Appeals. Yet the claim is ordered expunged under Section 57(g), which refers to Section 60(b). The inference seems to be that the creditor is to be held chargeable as a matter of law with reasonable cause to believe that the payment would effect a preference because of his presumed knowledge that he was getting an *advantage* over other creditors.

Summarizing, we contend that the rule adopted below is contrary to the plain wording of the statute; that it makes every payment on account by an insolvent debtor within four months of bankruptcy voidably preferential and does so regardless of whether or not in fact, or by fair inference from the facts, the creditor at the time of payment had reasonable cause to believe that the payment he received was a greater percentage of his claim than other creditors could then have got.

Section 60(b) of the Bankruptcy Act in its present form has been the law since 1910. It is, to say the least, remarkable that it should at this late date be now interpreted in such a way as to make all payments on account by an insolvent debtor within four months of bankruptcy preferential and voidable by the Trustee, regardless of the state of the debtor's assets at the time of payment. The absence of earlier decisions so holding is in itself good reason to doubt the correctness of such interpretation of the Act.

CONCLUSION.

The decision below on the preference point should be reversed.

Respectfully submitted,

JOHN A. McMANUS,
Counsel for the Viscose Company as
amicus curiae.

SPENCER, ORDWAY & WIERUM,

Stipulation.

IT IS HEREBY STIPULATED AND CONSENTED by and between counsel for both of the parties hereto that the Viscose Company, appellant in a case now pending in the United States Circuit Court of Appeals for the Second Circuit, entitled *Harry J. Jentzer, as Trustee in Bankruptcy of Yarns Corporation of America* v. *The Viscose Company,* October Term, 1935, No. 32, may file the within brief as *amicus curiae* herein with the Clerk of the Supreme Court. Service upon each of the undersigned of a copy of said brief is hereby admitted.

Dated, New York, November 2nd, 1935.

MAXWELL H. GOLDSTEIN,
Solicitor for Appellant.

OTTERBOURG, STEINDLER & HOUSTON,
CHAS. A. HOUSTON,
Solicitors for Respondent.